

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2008 MSPB 224

Docket No. AT-3443-07-0076-B-1

**Daniel T. Mapstone,
Appellant,**

v.

**Department of the Interior,
Agency.**

September 26, 2008

K.T. Mapstone, Saltillo, Mississippi, for the appellant.

Horace G. Clark, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the remand initial decision (RID) that dismissed his employment practices appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's PFR under 5 C.F.R. § 1201.115, REVERSE the RID, and REMAND the appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a GS-12 Fire Management Officer with the National Park Service in Tupelo, Mississippi. Initial Appeal File (IAF), Tab 1 at 1, Tab 8 at 1-2. In July 2006, he applied under agency Vacancy Announcement No. SESO 06-82 for a GS-0401-13/14 Fire and Aviation Management Officer position in Atlanta, Georgia. *Id.*, Tab 5, Subtabs 4e-4f. The vacancy announcement required, in relevant part, that an applicant have a “[d]egree” in “biological sciences, agriculture, natural resource management, chemistry, or related disciplines appropriate to the position” and a “[c]ombination of education and experience-[c]ourses equivalent to a major, ... plus appropriate experience of [sic] additional education.” *Id.*, Subtab 4f at 3. The vacancy announcement noted that the position “is covered under the Supplemental Qualification Standard for the GS-0401 Fire positions....” *Id.*

¶3 On August 31, 2006, the agency notified the appellant that he had not been selected for the position because he “did not meet the minimum qualifications requirements as stated in the vacancy announcement” and failed to “meet basic requirements.” *Id.*, Subtab 4d. The agency subsequently explained that the appellant was required to have a “degree” in the relevant fields of study, *id.*, Subtab 4a, that a “degree” was identified as successful completion of a full 4-year course of study in an accredited college or university leading to a bachelor’s degree that included a major field of study, *id.*, and that, because he had two Associate’s degrees, he failed to qualify for the position.

¶4 The appellant then filed this appeal. IAF, Tab 1. In response to the administrative judge (AJ)’s order and the agency’s motion to dismiss for lack of jurisdiction, *id.*, Tab 5, the appellant argued, in part, that the Board has jurisdiction over his appeal pursuant to 5 C.F.R. §§ 300.103 and 300.104(a). IAF, Tab 8 at 12. He asserted that the agency’s determination that he failed to meet the basic requirements of the Fire and Aviation Management Officer position was an “employment practice” that violated 5 C.F.R. § 300.103(b)

because there was no “rational relationship” between performance in the position and the educational requirements imposed by the agency, and that 5 C.F.R. § 300.103(b) generally prohibits the establishment of a “minimum educational requirement.” *Id.* Finally, he contended that he exceeded the basic requirements for the position based on his 14 years of experience as a Wildland Fire Manager and his related achievements and publications. *Id.* at 12-14. He submitted several documents in support of his contentions. *Id.* at 1-11; IAF, Tab 10.

¶5 Without holding the requested hearing, the AJ dismissed the appeal, finding that the Board lacks jurisdiction over “an agency’s selection process.” IAF, Tab 11. With respect to the appellant’s allegation that the Board has jurisdiction over his appeal as an employment practices case under 5 C.F.R. § 300.104, the AJ found in the ID that, even assuming that the appellant sufficiently identified an “employment practice,” there was no employment practice applied by the Office of Personnel Management (OPM), as the regulation provides. *Id.* at 2-3.

¶6 The appellant filed a PFR of the ID. The Board granted the appellant’s petition, affirmed the ID in part, vacated it in part, and remanded the appeal to the regional office to afford the parties an opportunity to fully develop the record on the issue of the Board’s jurisdiction over the appeal as an employment practices claim. *Mapstone v. Department of the Interior*, 106 M.S.P.R. 691 (2007) (*Mapstone I*). On remand, the AJ again dismissed the appeal for lack of jurisdiction, finding that the appellant had failed to meet his burden to show, not merely allege, that the employment practice violated 5 C.F.R. § 300.103. Remand File, Tab 5. The appellant has now filed a PFR of the AJ’s RID. Remand Petition for Review File, Tab 1.

ANALYSIS

¶7 We grant the appellant’s PFR and reverse the RID because the AJ misapplied the jurisdictional burden for establishing an employment practices

appeal. The Board has jurisdiction under 5 C.F.R. § 300.104(a) when two conditions are met: First, the appeal must concern an employment practice that OPM is involved in administering; and second, the employment practice must be alleged to have violated one of the “basic requirements” for employment practices set forth in 5 C.F.R. § 300.103. *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368, 1373 (Fed. Cir. 2003); *Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 887 (Fed. Cir. 1998); *Scott v. Department of Justice*, 105 M.S.P.R. 482, ¶ 10 (2007) (Emphasis added). In *Mapstone I*, the Board cited to that standard, but inadvertently omitted that the second condition is met by a nonfrivolous allegation that the employment practice violated one of the “basic requirements” for employment practices set forth in 5 C.F.R. § 300.103(b).

¶8 After reviewing the evidence and argument in the record, we find that the appellant has met the criteria for establishing the Board’s jurisdiction over his employment practices appeal. First, the appeal involves an employment practice that OPM is involved in administering. The term “employment practices” includes the development and use of examinations, qualification standards, tests, and other measurement instruments. 5 C.F.R. § 300.101. Moreover, an agency’s misapplication of a valid OPM requirement may constitute an appealable employment practices action. *Holse v. Department of Agriculture*, 97 M.S.P.R. 624, ¶ 6 (2004) (citing *Prewitt*, 133 F.3d at 887). Second, by alleging that there is no rational relationship between performance in the position and the educational requirements, 5 C.F.R. § 300.103(b), the appellant has made a nonfrivolous allegation that the employment practice violated a basic requirement of 5 C.F.R. § 300.103.

ORDER

¶9 Accordingly, we remand the appeal to the Atlanta Regional Office to adjudicate the merits of the appellant's employment practices appeal, consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.